1983 for an order of sale of the charged property. It appeared that the total amount owing was about $150,000. In addition, there was another sum of $60,000 owed by the defendant associate companies to the plaintiff. Both the defendant and the associate companies could not raise the money to settle the loan. Quite understandably, being an old customer of the plaintiff, the plaintiff agreed to withdraw the application under Originating Summons 17 of 1983 upon the plaintiff granting a fresh loan of $300,000 to Myli Enterprise Sdn. Bhd. to be secured by the said property belonging to a family friend of the defendant, Low Hean Teik, who is a director of Myli. It was also agreed that the fresh loan of $300,000 would be utilised to settle in full the debt due and owing by the defendant and its associate companies which at that point of time had already amounted to about $210,000. The balance of $90,000 was to be paid into a new account of the defendant with the plaintiff which would be utilised to service the interest of the principal sum of $210,000. After everything was agreed, the solicitors of the bank moved in, so to speak, to prepare the necessary documentations to give legal effect to the said arrangement, which included resolutions passed by the defendant company and Myli Enterprise Sdn. Bhd., relating to opening of account with the plaintiff. However, the unfortunate feature of the whole episode came to the open when it was realised that one of the directors of Myli Enterprise Sdn. Bhd. had absconded with a sum of money amounting to $90,000 which he had withdrawn from Myli's account with the plaintiff. The company ceased business and attempts were made to trace the culprit. Interest on the overdraft began to accumulate which by December 26, 1983 amounted to $356,242.94.

Counsel for the defendant had persuaded this Court not to grant the plaintiff's application because she blamed the bank for permitting the withdrawal of moneys by Low Hean Teik from Myli Enterprise's account contrary to the resolution of the defendant. She alleged that the plaintiff's conduct was wrongful, and submitted that the bank was guilty of unconscionable conduct. She referred to the cases of *Murugappa Chettiar* v. *Letchumanan Chettiar*[1]; *Public Finance Bhd.* v. *Narayanasamy*[2]; and *Kheng Soon Finance Bhd.* v. *M.K. Retnam Holdings Sdn. Bhd. & Ors.*[3] In all these cases, the facts are dissimilar with the present case. However, in the *Kheng Soon Finance* case it was held, *inter alia*, on an application for sale of the land charged the Court has not only to apply the law but also to invoke the aid of equity in order to satisfy whether a cause to the contrary has been shown or not in accordance with section 256(3) of the National Land Code. The chargee must not only come to Court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the Order.

Thus, in applying the principle stated above to the facts and circumstances in the present case, I am satisfied that the chargee is not guilty of any unreasonable or unconscionable conduct. In fact I find the defendant has failed to show any existence of cause to the contrary under section 256(3) of the National Land Code. Clearly, what the plaintiff had done before the order of sale was to accede to the defendant's request to delay the application to enable the defendant to find a suitable purchaser for the said property so that they can get the money to redeem the charge created against the plaintiff. This I think the defendant had failed to do and it was then open to them to raise the issues with a view to delay the sale.

For the above reasons, I find there was no merit in the defendant's objection. I confirmed my order given on June 17, 1985 granting the plaintiff an order of sale of the said property.

Application allowed.

Solicitors: *Lim Cheng Poh & Lim; Lim Kean Siew & Co.*

CHIEW SWEE CHAI v. BRITISH AMERICAN INSURANCE CO. (M) SDN. BHD.

[O.C.J. (Shankar J.) December 22, 1985]

[Muar – Originating Summons No. 229 of 1983]

Insurance Law – Life policy – Basic accidental dismemberment of limb benefit – Complete loss of function of insured's left arm – Refusal to amputate – Whether "loss" as defined in policy.

The plaintiff, the insured, took out a life policy with the defendants, the insurers, effective from July 14, 1980. The policy provided, *inter alia*, that if the insured should, by accidental means, sustain the loss of one limb, the insurers would pay the insured one half the amount of

insurance payable at the time of such loss. Loss was defined as "dismemberment by severance at or above the wrist or ankle joint."

On September 26, 1980 the insured met with a motor vehicle accident which resulted in a complete loss of the function of his left upper limb. The Medical authority advised a complete amputation of the said limb. The insured declined to have an amputation. His solicitors wrote to the insurers as to whether the "matter could be treated as dismemberment by severance." The insurers who refused to make payment claimed that severance was a condition precedent to payment. The insured then took out an Originating Summons contending that the interpretation of the insurers of the policy was strict and unreasonable as the hand was as good as amputated because for all practical purposes there had been a total loss of its use.

Held, dismissing the plaintiff's claim: (1) where the words of the policy are crystal clear it is the view of this Court that the sanctity of the contract should be upheld. The words have been put there to obviate the necessity for making fine judgments whether a limb has or has not been lost;

(2) even the plaintiff must concede that the limp arm serves a cosmetic purpose. He simply cannot say that he has lost it because it is still there for the whole world to see.

Case referred to:

(1) *Dufty* v. *City Mutual General Insurance Ltd.* [1977] Queensland Rep. 94.

[Cases also cited: *Robertson & Anor.* v. *French* [1803-1813] All E.R. 350; *North British & Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1877) L.R. 5 Ch. D. 569; *Hutton* v. *Watling* [1948] Ch. 26, 398; *Hydarnes Steamship Co.* v. *Indemnity Mutual Marine Assurance Co.* [1895] 1 Q.B. 500; *David M'Cowan* v. *Baine and Johnston & Ors.* [1891] A.C. 48-59; *Etherington and the Lancashire and Yorkshire Accident Insurance* [1909] 1 K.B. 591; *Hooper* v. *Accidental Death Insurance Co.* (1860) 5 H & N 546, 157 E.R. 1297; *Sheanon* v. *Pacific Mutual Life Insurance Co.* 77 Wis. 618; *Lord* v. *American Mutual Accident Association* 61 N.W. 293; *Liversidge* v. *Anderson* [1941] 3 All E.R. 338; and *Persin Kaur* v. *The Renong Tin Dredging Co. Ltd.* [1967] 2 M.L.J. 286, 289.]

ORIGINATING SUMMONS.

K.S. Dass for the plaintiff.

P. Cumaraswamy for the defendants.

Cur. Adv. Vult.

Shankar J.: The plaintiff (hereafter referred to as the "insured") took out a life policy with the defendants (hereafter referred to as the "insurers") effective from July 14, 1980. That portion of the policy which is material to the present case reads as follows:-

"BASIC ACCIDENTAL DISMEMBERMENT BENEFIT

If, while this Policy is in full force and effect . . . the Insured, by injuries caused solely by . . . accidental means, shall sustain the loss of one hand . . . , the Company will pay the Insured one half the amount of insurance payable at the time of such loss, and the Insured may continue the original Policy, without the BASIC ACCIDENTAL DISMEMBERMENT BENEFIT clause, . . .

It is understood that loss shall mean with regard to hands and feet, dismemberment by severance at or above the wrist or ankle joint; . . . "

On September 26, 1980 the insured met with a motor vehicle accident. He was admitted into the Batu Pahat hospital. The x-rays only revealed a fracture of the left femur. The clinical picture however, was very much more serious. Although the fracture was well aligned, the insured was unable to move the left arm and clinically he was diagnosed to be suffering from left brachial palsy involving the 4th, 5th and 6th lumbar segments.

He discharged himself against medical advice on October 11, 1980 from the Muar Hospital and had himself admitted into the Singapore General Hospital on October 26, 1980. Here he received further treatment. An electro myelogram (EMG) was done which revealed that the insured had a complete brachial plexus with no signs of degeneration. There was complete loss of the function of his left upper limb and on February 3, 1981 a Director of the Ministry of Health Singapore issued a formal certificate stating it as his opinion that in six months' time the insured would have had to undergo the complete amputation of his left upper limb.

The insured then presented his claim to the Branch Manager of the insurers at Batu Pahat. This man recommended to his Principal at Kuala Lumpur that as the attending doctor in Singapore had certified that the insured would suffer the loss of his left arm permanently there should be settlement of $2,375 due to loss of the left arm. But the Insurers' Claims Committee felt that it would be fair to their company that such payment should only be made after the amputation was done because it was their view that the wording of the policy required the severance of the arm at or above the wrist before payment could be made.

On July 9, 1981, the Ministry of Health Singapore issued a second letter to whom it may concern. This repeats that it is anticipated that in six months' time the insured would have a complete amputation of his left upper limb. The

words of this certificate are identical to the earlier one and it is not clear to me whether the document is merely a copy of the material words in the previous certificate or whether the medical advisers in Singapore had postponed the necessity for the amputation for a further six months.

In September 1981 the insured put the matter in the hands of his solicitors. The medical opinion was that the arm would have to be amputated in due course; they felt that it would not be unreasonable for the insurers to pay and requested accordingly. But the insurers felt otherwise. They pointed out that severance was a condition precedent to payment and that the medical certificate only made amputation an event which was to take place at some future date. Subsequently on April 20, 1983 the insured's solicitors wrote again to the insurers. They said:

"Our client's hand has not been amputated to date in view of the heavy expenses he may incur. Kindly let us know whether you could treat this matter as dismemberment by severance."

The insurers responded immediately that without an amputation the request for payment could not be entertained.

On August 3, 1983 the insured's solicitors informed the Director of the Singapore General Hospital that the insured had declined to permit the amputation of his left upper limb and asked the doctor certain questions to which he replied that the effect of non-amputation is negligible as the patient has lost the total use of his left upper limb, that the extent of permanent disability he may suffer is the same, that the advantage of an amputation is to remove the useless hand so that he can concentrate and use a prosthesis, and finally that the opinion of amputating the left hand differs in various centres and whether the hand is amputated or not, the disability remains the same.

With this material the insured's solicitors filed an Originating Summons in this High Court on November 12, 1983.

The insured affirmed an affidavit in which he states that he had declined to have an amputation because even though the injured limb now hangs limp from his shoulder and is physically useless and wasted apart from its mere existence, at least he does not have to go through life with less than his full physical faculties and that he believed that the consequential ungainly and deformed sight at the site of such an operation would be too traumatic an experience for him. He contended that the interpretation of the insurers of the policy was strict and unreasonable and that the proper interpretation of the words should be directed to impose liability upon the insurers since the hand was as good as amputated because for all practical purposes there had been a total loss of its use.

Counsel for the insured has addressed a very lengthy written submission in support of this view. A number of cases have been cited on the principles to be adopted when construing such documents. Of course the interpretation should be reasonable, and of course any ambiguities should be resolved against the person in whose favour the document has been framed. A number of American decisions were also cited where it was held that in the absence of clear language in such policies, the courts would treat the loss of use of a limb as being equivalent to loss by severance. But where the words of the policy are crystal clear it is the view of this court that the sanctity of the contract should be upheld.

MacGillivray & Parkington on Insurance Law 9th edn. at para. 1812 states:

"Loss of hands, feet or limbs means loss as a matter of practical utility and is not confined to loss by severance, unless so expressed."

Further in Insurance Law in Australia and New Zealand by *K.C.T. Sutton* at p. 407 it is stated:

". . a clause providing for compensation in the event of total loss by physical severance of the whole of both hands or the whole of both feet is not applicable to a paraplegic who has suffered total disablement of his limbs, for a disabled limb is not the same thing as a severed limb; . . "

Dufty v. *City Mutual General Insurance Ltd.*[1] is the case cited as authority for this proposition. Kneipp J. at page 96 said:

"It is claimed that he should recover under two other clauses, or under one or other of them. First there is a provision for compensation in the sum of $4,000 in the event of total loss by physical severance of the whole of both hands or on the whole of both feet, or of the whole of one hand and the whole of one foot. The plaintiff has not lost any limb or limbs, but his lower limbs are completely disabled. Counsel for the plaintiff relied on decisions of American jurisdiction to the effect that total disablement of a limb should, for the purpose of provisions such as this, be regarded as severance of the limb. With respect, I cannot agree with that. I think that it is a plain misuse of language to say that disablement of a limb is the same thing as severance of a limb."

The chapter and verse which has been directed to this court to hold for the plaintiff makes it only too obvious that there is a sense of outrage that the insurers here are insisting upon an amputation when, on any view of the medical reports, no benefit will accrue to the defendants by insisting on having the plaintiff's arm amputated. It has been left to be implied that the cost of the operation may outweigh the amount payable under the policy so as to make it uneconomical for the plaintiff to go through with the exercise even if he were minded to do so. Indeed in his written submission, counsel for the plaintiff, has sought to draw parallels between the defendants' attitude, and Shylock's insistence upon the performance of his bond in *The Merchant of Venice.* But the defendant is an insurance company with a duty to its shareholders. A company is entitled to expect its officers to carry out their duties in accordance with the tenor of their obligations.

Mr. Param Cumaraswamy, counsel for the defendants has submitted that the language of the policy, particularly that under the heading 'Basic Accidental Dismemberment Benefit', is clear and unambiguous. Indeed the very purpose of providing for the meaning of loss of hands and feet is to see that there is no doubt or confusion as to the meaning of the risk covered. He says that it is the failure to provide such definitions which caused controversies in the American cases cited by plaintiff's counsel.

With these views I entirely agree. The words have been put there to obviate the necessity for making fine judgments whether a limb has or has not been lost. As Milton says, "they also serve, who only stand and wait." Here there was a prognosis for amputation in 1981 but in terms of percentage disability the plaintiff's medical adviser assessed 75% for the left upper limb. Taking the dimmest view of this, even the plaintiff must concede that the limp arm serves a cosmetic purpose. He simply cannot say that he has lost it because it is still there for the whole world to see.

The claim is dismissed with costs.

Claimed dismissed.

Solicitors: *Wong & Dass; Shook, Lin & Bok.*

LIAN KEOW SDN. BHD. (IN LIQUIDATION) & ANOR. v. OVERSEAS CREDIT FINANCE (M) SDN. BHD. & ORS.

[O.C.J. (Yusoff Mohamed J.) January 25, 1986]

[Johore Bahru – Civil Suit No. 100 of 1980]

Company Law – Transfers, charges and sales of land before and after commencement of winding up – Validity of transactions – Whether first defendant had knowledge of winding up – Validation order – Claim against company director – Companies Act, 1965, ss. 229 & 293 – Interpretation Act, 1967, s. 35(1).

Bankruptcy Law – Transfers, charges and sales of land before and after commencement of winding up – Validity of transactions – Whether first defendant had knowledge of winding up – Validation order – Claims by liquidator – Bankruptcy Act, 1967, ss. 53 & 53B.

Land Law – Transfers, charges and sales of land before and after commencement of winding up – Validity of transactions – Whether should be set aside – Trust – Caveat – Whether first defendant had knowledge of winding up – Validation order – Factors for granting – National Land Code, 1965, ss. 206(1)(b) & 320(2).

This case concerned three portions of a piece of rubber estate measuring a total of 893 acres owned by Lian Keow Sdn. Bhd. (the first plaintiff) located in the Mukim of Pulai, District of Johore Bahru. The first plaintiff, a local company, was wound up on March 11, 1979. The second plaintiff is the provisional liquidator of the affairs of the first plaintiff. The first defendant was and is a licensed finance company controlled by one Amos William Dawe of the Mosbert Group of Companies from December 1972 to October 1979. Mosbert Berhad was wound up in 1977. The second defendant, Sungei Perling Holdings Sdn. Bhd., was incorporated in Malaysia on May 9, 1979 and its directors were one Gwei Wang Kiat and his wife. The third defendant is Perusahaan Pelangi Sdn. Bhd. The fourth defendant is Chelliah Paramjothy, an advocate and solicitor. The fifth defendant is Yap Fui Chong, the main shareholder of the first plaintiff at the material times.

In this suit the plaintiffs seek declarations that a series of transactions consisting of charges, transfers and sales of lands in the rubber estate belonging to the first plaintiff which were executed before and after the presentation on November 13, 1978, of the petition for winding up of the first plaintiff was null and void.

The central figure in this case and frequently referred to by all the parties involved in these transactions is Dawe, who controlled the first plaintiff when the fifth plaintiff agreed to sell the whole of the share capital of the first plaintiff to Dawe on December 6, 1972. This brought the first plaintiff to troubled waters. On December 12, 1972, the fifth defendant (on the direction of Dawe) caused the first plaintiff to execute a charge of the first portion (503 acres) of the estate in favour of the first defendant to secure a loan of M$2,500,000 with interest. This loan was paid by the first defendant to Syarikat Ng Kong Yeam. On February 27, 1973 the fifth defendant (on the direction of Dawe) caused the first plaintiff to execute a transfer of the